REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 6 OF 2015

CHRISPINE WAWERU NJERI……..……... APPELLANT

VERSUS

REPUBLIC…….…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 944 of 2013 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 7th August 2014)

JUDGMENT

INTRODUCTION

1. The Appellant, Chrispine Waweru Njeri, was tried and convicted by E.M. Kadima, Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (1)(4) (sic) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment.

2. The particulars of the charge were that :-

> **On the 1st November 2013 at about 7.30 am at *[particulars withheld]* Estate, unlawfully and intentionally caused his penis to penetrate the vagina of W H a child aged 16 years.**

3. The alternative charge was for indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

> **On the 1st November 2013 at about 7.30 am at *[particulars withheld]* area within Taita Taveta County, unlawfully and intentionally touched the vagina of W H a child of 16 years old** (sic)**.**

4. Being dissatisfied with the said judgment, on 15th January 2014, the Appellant filed a Memorandum of Grounds Appeal. The grounds of appeal were that there was:-

> **1. Arbitrary and unlawful punishment in breach of Section 89(5), 214(1), 215(1), 276(2) of the c.p.c.75 Laws of Kenya** (sic)**.**
>
> **2. Arbitrary and unlawful punishment in breach of sections 8(1), 8(4) of the sexual offences act no. 3 of 2006**(sic)**.**
>
> **3. Arbitrary and unlawful punishment in breach of sections 153, 154(1), 163(1) (c) of the evidence act cap (80) laws of Kenya** (sic)**.**

4. Arbitrary and unlawful punishment in breach of sections 107(1) (2), 109 of the evidence act cap (80) laws of Kenya (sic)**.**

5. Arbitrary and unlawful punishment in breach of sections 212, 235 of the c.p.c. cap (75) laws of Kenya (sic)**.**

5. His Amended Grounds of Appeal and his Written Submissions were dated 6th July 2015. He listed the following grounds of appeal:-

1. That the trial magistrate erred in law and fact by failing to consider that no formal birth certificate and Age Assessment Report was prepared, produced as exhibit to proved (sic) **the exact age of PW 1 (Complainant) in compliance with Section 8 of the S.O. Act.**

2. The trial magistrate erred in law and fact by failing to consider none (sic) **disclosure of all the evidentiary materials and exhibits held in possession by the prosecution before the start of the trial proceedings against the accused now Appellant** (sic)**.**

3. The trial magistrate erred in law and fact by failing to consider the inadmissible confession (oral confession) made by the complainant in breach of Section 29(a)(b) of the evidence (sic) **Act.**

4. The trial magistrate erred in law and fact by failing to consider PW 2(Mother) (sic) **Hearsay evidence and failure to call or compel vital eye witnesses by the prosecution.**

5. The trial magistrate erred in law and fact by failing to consider PW 1(Complainant) Medical examination was conducted after the expiry of 72 hours (4 days) later (sic) **from the date when the offence was committed on her.**

6. The trial magistrate erred in law and fact by failing to consider his alibi defence in breach of Section 212, 235 of the C.P.C

6. The State's Written Submissions, List and Bundle of Authorities were dated 21st September 2015 and filed on 22nd September 2015 while the Appellant's Written Submission in Reply were filed on 24th September 2015.

7. When the matter came up for the hearing of the appeal on 24th September 2015, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same.

LEGAL ANALYSIS

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. In establishing whether or not the Appellant's guilt was proven in the charge of defilement of the Complainant (hereinafter referred to as "PW 1") that allegedly occurred on 1st November 2013, the court identified the following issues that were dealt with under the different heads to have been really been pertinent for determination herein:-

a. **Whether or not the Appellant was given a fair trial?**

b. **Whether or not the evidence adduced by PW 1 and PW 2 herein was admissible?**

c. **Whether or not the Appellant had established an alibi?**

d. **Whether or not the Prosecution had proved its case beyond reasonable doubt?**

FAIRNESS OF TRIAL

10. The Appellant argued that the proceedings in the trial court were conducted in breach of the provisions of Article 50 of the Constitution of Kenya, 2010 as he was not furnished with witness statements and exhibits. He admitted that the Learned Trial Magistrate ordered that he be furnished with the said documents but that he nonetheless commenced with the case even after he protested that he had not been given the said documents.

11. A record of the proceedings shows that on 20th December 2013, the Appellant requested to be furnished with copies of the Witness Statement and the Charge Sheet. The trial court adjourned the case to 18th February 2014 to enable the Appellant obtain the said documents at his own cost. However, the matter did not proceed on that date as the trial court was not sitting and was adjourned to 11th March 2013 for hearing.

12. On that date, the Appellant did not seek any adjournment on the ground that he had not been furnished with the Witness Statements and the Charge Sheet and the hearing commenced. In fact, the issue of not been supplied with the said documentation did not appear to have been raised during the trial and was only brought up at this appellate stage.

13. There was no legal obligation on the part of the trial court to ascertain to itself if the Appellant had obtained the said documents once it had issued an order that the said documents be availed to him. It was the responsibility of the Appellant to have informed the court if he had faced any difficulties obtaining the same. In this regard, the court wholly concurred with the State that this Ground of Appeal must fail in its entirety. The same is hereby dismissed.

ADMISSIBILITY OF PROSECUTION EVIDENCE

I. EVIDENCE BY PW 1

14. The court carefully considered the Appellant's arguments and case law relating to what he referred to as **"the oral confession"** by PW 1 which he said was in breach of the provisions of Sections 25A and 29(a)(b) (sic) of the Evidence Act Cap 80 (Laws of Kenya).

15. The reliance on the said sections was irrelevant and immaterial in the circumstances of this case as the said Sections deal with persons before whom an accused person can make a confession. PW 2's evidence that PW 1 confessed to the Deputy Head Teacher that she passed by a certain man's house did not amount to a confession within the meaning of Section 25A and 29 of the Evidence Act or at all.

16. It was also not necessary for PW 1's evidence to have been corroborated as had been contended by the Appellant if the trial court was satisfied that she was telling the truth. Indeed, the Court of Appeal did pronounce itself on the question of corroboration of evidence of children of minor years, which PW 1 herein was not, when in the case of **Mohamed v Republic [2006] 2 KLR 138**, it stated that:-

> **"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

17. The court therefore once again found itself in agreement with the State that this ground of appeal must

fail in its entirety as there is no such proposition of a confession by a complainant, in law. Notably, a confession can only be made by an accused person. This Ground of Appeal is hereby dismissed as the Learned Trial Magistrate did not err in law and fact when he admitted PW 1's evidence during the trial.

II. EVIDENCE BY PW 2

18. It was the Appellant's argument that the trial court ought not to have relied on the PW 2's evidence regarding PW 1's age as it had observed that her evidence was based on heresay.

19. On the one hand, it is correct as the Appellant submitted that PW 2's evidence on whether or not he had committed the alleged offence was heresay. She was told about PW 1 having come from the Appellant's house by two (2) women. On the other hand, as was rightly pointed out by the State, the Learned Trial Magistrate did not consider PW 2's evidence when he came to the conclusion that the Prosecution had proven its case against the Appellant herein, beyond reasonable doubt.

20. On page 3 of his Judgment that was delivered on 7th August 2014, the Learned Trial Magistrate stated as follows:-

> **"The answer is in the affirmative** (sic) **the prosecution have demonstrated through the testimonies of PW 1, PW 3 and PW 4 that actual sexual contact happened between PW 1 and DW 1 who was a minor at the time of the incident and how and where it took place."**

21. In his Judgment, the Learned Trial Magistrate only observed that although PW 2 was not an eye witness, she testified on the chronology of events leading to the Appellant's arrest. He had indicated that PW 2 identified the Appellant whereupon PW 4 preferred charges against the Appellant.

22 Her evidence did nothing to assist this court in establishing how the Appellant was arrested. The only observation this court wishes to make was that it was, however, not clear from the proceedings in the trial court at what stage PW 2 identified the Appellant before he was arrested by PW 4.

23. Be that as it may, the court was in agreement with the submissions by the State that nothing turns on this Ground of Appeal as the Learned Trial Magistrate did not consider PW 2's evidence in finding that there was contact between PW 1 and DW 1. The said Ground of Appeal is hereby dismissed.

APPELLANT'S ALIBI

24. The Appellant gave unsworn evidence and waived his right to call any witnesses. In law, no weight can be attached to evidence that has not been tendered in court under oath. It has neither probative nor evidentiary value.

25. As was held by the Court of Appeal in the case of **May vs Republic (1981)KLR** that was cited in the case of **Faustine Mghanga vs Republic [2012] eKLR** that the State placed reliance upon:-

> **"An unsworn statement…potential value is persuasive rather than evidential…"**

26. The State correctly argued that the Appellant ought to have raised the defence of alibi very early in the prosecution case. Having failed to do so, he was estopped from raising the defence of alibi at this appellate stage. The trial court could not analyse evidence that had not been placed before it during the trial. The Appellant's Ground of Appeal that his conviction should be set aside as the trial court did not consider his alibi fails. This said Ground of Appeal is also hereby dismissed.

PROOF OF PROSECUTION'S CASE

27. In determining whether or not there had indeed been sexual contact between PW 1 and DW 1 as had been determined by the learned Trial Magistrate, the court deemed it fit to analysis the evidence that was given by the Prosecution witnesses under the heads showed hereinbelow.

I. <u>THE COMPLAINANT'S AGE</u>

28. The Appellant submitted that PW 1's age was not known as no formal birth certificate or Age Assessment Report on her was tendered in evidence by the Prosecution. He was emphatic that nowhere in her evidence did she tell the trial court her exact age as at the time of the alleged offence. He took issue with PW 2's evidence, who he referred to as PW 1's mother but who in fact from the evidence that was adduced was PW 1's elder sister for stating that PW 1 was aged seventeen (17) years, which was contrary to the age that had been stated in the Charge Sheet.

29. His argument was that this was contrary to the age of sixteen (16) years that had been given in the P3 Form and that having been a witness who had adduced heresay evidence, her evidence ought not to have been believed.

30. It was his further contention that PW 3, who was the medical officer, did not medically examine PW 1 to ascertain her age but merely wrote in the P3 Form that she was aged sixteen (16) years. It was his submission that PW 1's age could only have been proven either by the production of a birth certificate of an Age Assessment Report, which PW 4, who was the Investigation Officer herein, failed to produce as evidence.

31. On its part, the State contended that PW 1's age was set out in the P3 Form. It was also its averment there was no dispute that being PW 1's elder sister and having lived with her since she was in Class One (1), PW 2 was best placed to state PW 1's age.

32. The State referred the court to the case of **<u>Faustine Mghanga vs Republic</u>** (Supra) in which Nzioka J rendered herself as follows:-

> **"I do appreciate the importance of age assessment in such cases. But honestly, who can know the age of a child better than the mother of a child and or the child (if of age?). I personally take judicial notice of the fact that most people in rural areas (and even urban areas) would not purpose to have a birth certificate unless required for a specific purpose…**
>
> **In the case of Mangunyu vs Republic, Hon. Justice W. Ouko, quoting reference from I.E. Collingwood's Criminal Law of East and Central Africa (London: Sweet and Maxwell) 1967 Ed of page 123 observed**
>
> **"Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at birth.""**

33. The State also placed reliance on the cases of **<u>Alfayo Gombe Okello vs Republic [2010] eKLR</u>** and **<u>JWA Vs Republic [2014] eKLR</u>** where the Court of Appeal stated that the age of a child as stated in the P3 Form and produced in court can be used to ascertain the age of the child.

34. The court was not persuaded by the Appellant's arguments that PW 2 gave an age in respect of PW 1 that was different from that which was given in the P3 Form. His submission that there was a contradiction of facts in the P3 Form, the Charge Sheet and PW 2's evidence could not hold water as the alleged offence occurred in 2013 while she testified in court in 2014. Indeed, it is not unusual for the age one is going to attain in the course of any particular year being rounded off even when one has not attained that exact age.

35. The more pertinent question was whether or not PW 1's age was proven. The determination of PW 1's age was critical in determining whether or not an offence under the Sexual Offences Act Cap 62A (Laws of Kenya) had been committed by the Appellant. This was particularly material in view of the fact that the Appellant's liberty would definitely be curtailed for several years if he was found to have been guilty of the offence of defilement.

36. A perusal of the proceedings does not show whether or not the trial court enquired about PW 1's

actual age at the time she was being asked if she understood the importance of giving evidence under oath and the consequences thereof. The learned Trial Magistrate merely stated as follows:-

> **"After carefully listening to the questions posed to the child witness, the court is convinced she is possessed of sufficient understanding to testify under oath. She may proceed and be sworn."**

37. Notably, the Prosecution did not lead evidence to demonstrate PW 1's age even when this critical witness took to the stand. She was not asked what her age was and neither was it recorded by the Learned Trial Magistrate at the commencement of the trial. PW 1 only testified that she was going to school at 7.30 am when she met the Appellant but that she did not have any books with her.

38. It is also important to note that in his Judgment, the Learned Trial Magistrate did not address himself to PW 1's age, in fact the question of proof of PW 1's age was not delved into or at all. On his part, PW 3, Dr Mustafa Maasai, of Moi District Hospital tendered in evidence a P3 Form that was filled by Dr Ouma that showed that PW 1 was aged approximately sixteen (16) years. It was an estimated age.

39. It was the observation of this court that it was difficult for it court to establish what PW 1's age really was from the way the proceedings were recorded. A perusal of the said proceedings would lead one to believe that she was a child of very tender years yet this does not appear to have been the case.

40. The several cases that were relied upon by the State, demonstrate that the issue of ascertaining a complainant's age is not one that can be taken casually when dealing with defilement cases. This is because the complainant's age is directly correlated to the sentence that an accused person is to be handed if he is to be found guilty of the offence of defilement against such a complainant.

41. In the case of **JWA vs Republic** (Supra), it was clear that the child's age therein was recorded. PW 1, C.N. testified as follows:-

> **I am ten years old. I go to MK Primary School…"**

42. In the case of **Faustine Mghanga vs Republic** (Supra), Nzioka J stated as follows:-

> **"…I now turn to the issue of the age of the complainant herein. The complainant told the court that she was 8 years old…"**

43. Although a trial court has the advantage of approximating a complainant's age through its interaction with such a complainant, an appellate court will have no privilege of such interaction hence the importance of the trial court setting out the oral and documentary evidence it relied upon to support its findings that it was satisfied that the defiled person was a child within the Children Act Cap 141 (Laws of Kenya).

44. Documentary evidence is particularly critical where victims are of teenage years because their physical appearance can be very misleading. A teenager who physically looks like he or she is sixteen (16) years and consents to sex may very well be eighteen (18) years of age. In such a case, no charge of defilement can be sustained as that would clearly be deemed to be sex between two (2) consenting adults.

45. It was therefore the view of the court that production of school records, a Certificate of Birth or any other document showing date of PW 1's date of birth or at the very least PW 1's own testimony of her age to have been assisted in ascertaining PW 1's age. Unfortunately, none of these were tendered as evidence or referred to in the trial court.

46. Despite the State's argument that PW 2 had lived with PW 1 since she was in Class One (1) and was therefore the only person who would have known PW 1's actual age, it was not sufficient for PW 2 to have given this age on behalf of PW 1 when PW 1 was said to have been seventeen (17) years of age and could have told the trial court her age. PW 1 did not appear to be a child of tender years as it was made to

appear in the proceedings before the trial court and was capable of speaking for herself.

47. The court therefore agreed with the Appellant that it was critical for the Prosecution to have tendered documentary evidence to prove PW 1's age and that in the absence of the same, it would be very unsafe to rely on PW 2 and PW 3's testimony in respect of PW 1's age.

48. The court thus came to the very firm conclusion that the Prosecution did not demonstrate that PW 1 was a child within the meaning of Section 2 of the Children Act and was wary about finding that the Prosecution had adduced sufficient evidence to sustain a charge of defilement against the Appellant herein. In the circumstances, this Ground of Appeal is hereby upheld and succeeds.

II. MEDICAL EXAMINATION

49. Having found that the Appellant had succeeded in the Ground of Appeal that PW 1's age was not ascertained, it would not have been necessary to look into the other Grounds of Appeal as that would have led this court into reversing the Judgment of the trial court.

50. However, on appeal, this court could well be found to have made a wrong finding on the issue of ascertainment of PW 1's age. It therefore felt that it was necessary to render itself on the remaining issues that had been placed before it for determination for the completeness of the record.

51. The Appellant submitted that PW 1 ought to have been examined within seventy two (72) hours of the alleged offence. He stated that although the date of the alleged offence took place on 1st November 2013, the P3 Form showed that PW 1 went to hospital on 4th November 2013.

52. The court took cognisance of the provisions of Section 124 of the Evidence Act that stipulate as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

53. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

54. The circumstances of the case herein were that it was PW 1's word against that of the Appellant as there were no actual eye witnesses to the alleged incident. It was her evidence that she was going to school when the Appellant called her and enticed her to come into his house to collect books he said belonged to her sister. This was at about 7.30 am.

55. She told the trial court that she stood at the door and refused to enter the house but that the Appellant pulled her inside and locked the door with a latch. She further said that the Appellant removed her panties, wore a Trust Condom and while pressing her against the wall, he inserted his penis in her vagina. She averred that after he finished, he told her to go.

56. One of the critical parts of her evidence before the trial court was that she had wanted sex on that day and that had the women not told her sister, she would never have mentioned it. PW 2 said that she was

told about the alleged incident by the Appellant's landlord who in turn told her that he had been told by two (2) ladies that PW 1 was seen leaving the Appellant's house.

57. In a nutshell, the following was a major part of PW 2's evidence:-

> **"He told me he had been informed by two ladies that H was coming from a man's house. I told him I don't believe him let me call two women who saw her. They corroborated her story. We went to the school to check** (sic) **the teacher was not aware what time she entered school but the prefect noted that she came to school late. The deputy teacher asked her where she was. She confessed that she passed by a certain man** (sic) **house. We went to the police to report and we were advised to go to hospital to confirm if there was any sexual contact. I came to know the perpetrator as Chrispin. I never knew Chrispin before until he was arrested."**

58. Indeed, PW 2 did not tell the trial court how she came to know that it was the Appellant who had allegedly defiled PW 1 or how she identified him leading to his arrest. Her evidence was extremely sketchy. Fortunately, the trial court did not attach much weight to it.

59. In the same vein, PW 1's evidence appeared to have been contradictory as on one hand she said that she stood by the door but that the Appellant pulled her into the house while on the other hand, she testified that she wanted to have sex on that day.

60. Although the trial court was first seized of the matter and had the advantage of observing the demeanour of witnesses, this court found itself in a very difficult position believing PW 1's and PW 2's evidence. From what was recorded in court, neither she nor PW 2 appeared to this court to have been truthful or credible witnesses. If they were truthful, the Learned Trial Magistrate failed to state his reasons in a manner that could be understood by an appellate court or justify why he believed PW 1 and not the Appellant herein.

61. Turning to the evidence that was adduced by PW 4 who was the Investigating Officer, he stated that he went to the Appellant's house on 30th November 2013 after being informed that the members of the public were about to lynch the Appellant. He said that the owner of the house, a woman, came out and told him that there was no one in the house. He said that he found the Appellant under the bed whereupon he preferred criminal charges against him.

62. In view of PW 4's evidence that the owner of the house was a woman and previously PW 2 had stated that the person who initially told her about the incident was a male, the court was unable to reconcile the disparity of the gender of the Appellant's Landlord. If at all there had been a change in who the Appellant's landlord was, then the same was not disclosed to the trial court or at all, leaving PW 2's evidence and that of PW 4 to have been contradictory and thus creating doubt in the mind of this court.

63. There was also no evidence that was adduced before the trial court to explain why the Appellant's arrest was made on 30th November 2013 when the alleged offence was said to have occurred on 1st November 2013. The question in this court's mind was **"What is it that had prevented the Appellant from being arrested immediately he committed the alleged offence?"**

64. The court is alive to the fact that Section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact, an issue that was addressed in **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic** (unreported) in which the Court of Appeal held that:

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive".**

65. Be that as it may, it is the responsibility of each party to call witnesses who would ideally be strengthening their case. The Landlord, mentioned by PW 2, the deputy head teacher, the two (2) women or those who were sitting on the bench when PW 1 is said to have left the Appellant's house were not called as witnesses yet they could have filled the gaps of the missing evidence herein, each of them giving evidence of what they each saw as the court found PW 1 and PW 2's evidence was too sketchy.

66. Having said so, entering a person's house would not lead to that person being arrested unless it can be shown that an offence had been committed. It may very well have been true that PW 1 left the Appellant's house that morning as she had alleged. However, the question that disturbs this court's mind was whether that was proof that she had sexual contact with the Appellant as she had contended and which the Learned Trial Magistrate found to have been the case.

67. In evaluating the evidence that was adduced in the trial court, the answer is in the negative. This court takes the strong position that an assertion by a victim of defilement ought to be backed by some sort of physical examination to establish penetration with a view to sustaining a water tight case at trial.

68. Whereas there is no window that has been imposed on a defiled person within which he or she should be examined by a medical officer, it is critical that medical examination be done at the earliest time possible not necessarily for purposes of obtaining DNA of a perpetrator but rather to observe, preserve and document all the relevant physical evidence of such defilement.

69. This is particularly critical where there are no other eye witnesses because at this point it would be the victim's word against that of a perpetrator. If such proof was not necessary, any malicious person could accuse another of such an offence on the strength of the fact that his or her assertion would be taken as the uncontroverted or gospel truth.

70. Notably, PW 3 told the trial court that at the time of the medical examination, there were no injuries to the head, neck, thorax, abdomen, upper limbs, lower limbs and that save for a whitish discharge, there was no visible laceration. He produced the P3 Form as evidence in this court. The said P3 Form showed that PW 1's hymen was broken. No evidence was led by the Prosecution to demonstrate that the Appellant was responsible for its breaking.

71. No reason was advanced to explain why PW 1 did not attend hospital on the same date of the alleged offence. Instead she attended hospital on 4th November 2013, which was three (3) days after the alleged incident. There was a lacuna in that evidence as the court would not be able to tell for a fact if PW 1 had sexual contact with another person other than with the Appellant.

72. In view of the time taken between the time of alleged offence and the time PW 1 went to hospital, this court was not convinced that the Prosecution had sufficiently demonstrated that indeed, PW 1's hymen was broken as a result of the Appellant's actions as she had contended.

73. In the absence of any proof of penetration, the court was once again of the considered view that sustaining the Appellant's conviction against the backdrop of the aforesaid gaps would be clearly unsafe as the Learned Trial Magistrate failed to state the reasons why he accepted PW 1's evidence and rejected that of the Appellant which was contrary to the proviso of Section 124 of the Evidence Act.

III. STANDARD OF PROOF

74. Accordingly, having carefully considered the submissions supported by the case law that was relied upon by both the Appellant and the State, the court came to the firm conclusion that the evidence that was presented in the trial court by the Prosecution was not sufficient to sustain a conviction of the Appellant on the charge of defilement of PW 1 herein.

75. It was incumbent upon the Prosecution to have adduced sufficient and cogent evidence and presented its case diligently to prove that the Appellant herein had actually committed the alleged offence as had been contended by PW 1.

76. In view of the seriousness of the sentences imposed on those convicted of having committed defilement cases and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.

77. Unfortunately, the proof that was adduced in the trial court was not to the standard required which in criminal cases, has to be beyond reasonable doubt. To this court, it did appear that the case against the Appellant herein was determined on a balance of probability.

78. Indeed, great injustice will be occasioned to the Appellant herein if this court were to uphold the conviction and sentence that was meted to the Appellant based on the evidence that was presented before the trial court. The failure by PW 1 to attend hospital immediately the alleged defilement occurred which denied the trial court an opportunity to appreciate any physical evidence of defilement and the delay in the arrest of the Appellant raised great doubts in the mind of this court as to what actually happened on the date of the alleged offence. Once doubt has been cast in the mind of the appellate court, it would be unsafe to uphold the Appellant's sentence.

79. In conclusion, as an obiter, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

80. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

81. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 13th day of October 2015

J. KAMAU

JUDGE

In the presence of:-

Chrispine Waweru Njeri……..Appellant

Miss Mukangu ……..State

Simon Tsehlo– Court Clerk